

No. 05-611

In the
SUPREME COURT OF THE UNITED STATES

State of North Dakota and
State of South Dakota
Petitioners,

v.

U.S. Army Corps of Engineers, et al.,
Respondents.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit**

**BRIEF OF THE STATE OF MISSOURI IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI**

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INTRODUCTION AND STATEMENT

Missouri and petitioners North and South Dakota (“the Dakotas”) have very different views of the Flood Control Act of 1944 and the substantive meaning of the Missouri River Master Water Control Manual (“Master Manual”), the rule that sets out the manner in which the United States Army Corps of Engineers (“Corps”) is to manage the water system that a series of dams created from the formerly free-flowing Missouri River. The views are largely the result of the dramatically different approaches that Dakota and Missouri citizens have taken to life on the River.

In Missouri, agriculture has flourished along the River. Farmers rely on the dams to prevent flooding of their land and to provide the continuous flows that make it possible to transport bulk materials – including fertilizers and crops – inexpensively. Farmers and shippers make long-term investments premised on the Master Manual, published by the Corps to satisfy the congressional mandate embodied in the Flood Control Act. Each year, in late winter, shippers, warehousemen, and navigators enter into contracts for the delivery of goods on the Missouri River – contracts that necessarily depend on the river flows promised by the Master Manual.

While farming has flourished in Missouri, under the management of the Corps and pursuant to the Master Manual a recreation industry has flourished in the upstream states. Instead of corn and soybeans, the product is tourism revenue, produced in part by fishing for walleye, a nonnative game fish that feeds on a small forage fish, the rainbow smelt. The smelt spawns in water only inches deep along the shores of the big lakes. The Dakotas tell this Court that a multimillion dollar recreation industry hinges on this tiny minnow. Like farmers in Missouri, those establishing businesses based on walleye fishing in the Dakotas proceed with full knowledge of the Master Manual and the manner in which it requires the Corps to manage the river. And despite some recent difficulties, the Dakota businesses have obviously thrived under the Master Manual regime.

Management under that regime and the Corps' recent process to update the Master Manual have resulted in a torrent of litigation among Missouri, the Dakotas, other states, and interested parties. The issue raised by this petition was first considered in litigation commenced by the Dakotas against the Corps that ultimately involved Nebraska, Missouri, and many others. Those cases arose out of the Corps' management under the prior Master Manual.¹ The Dakotas obtained injunctions from their respective federal district courts prohibiting releases from dams situated in the Dakotas, while Nebraska obtained an injunction from its federal district court requiring the Corps to maintain downstream river flows. The Eighth Circuit consolidated those cases for review and addressed the precise issue the Dakotas present in their petition, in *South Dakota. v. Ubbelohde*, 330 F.3d 1014 (8th Cir. 2003), *cert. denied*, *North Dakota v Ubbelohde*, 514 U.S. 987, 124 S. Ct. 2015 (2004).

To address the claims before it in *Ubbelohde*, the Eighth Circuit first had to construe the Flood Control Act of 1944, which granted the Corps the authority to manage the Missouri River system. The court held that flood control and navigation were the dominant functions of the Flood Control Act, and ruled against the Dakotas. This Court denied the Dakotas' petition for writ of certiorari. *Id.* at 1019-20.

Subsequent to the Eighth Circuit's decision in *Ubbelohde*, a number of different parties commenced more litigation. This litigation focused primarily on the development by the Corps of the updated 2004 Master Manual. The Judicial Panel on Multidistrict Litigation consolidated these cases in the District of Minnesota. *In re Operation of the Missouri River System Litigation*, 277 F. Supp. 2d 1378 (J.P.M.L. 2003). Ultimately, the Corps and other federal defendants moved for summary judgment, which the district court granted. *In re Operation of the Missouri River System Litigation*, 363 F. Supp. 2d 1145 (2004) (Petition Appendix ("Pet. App.") at 35). That decision led to an appeal to the Eighth Circuit and the decision

¹The Corps has since updated the Master Manual, giving rise to the current litigation over the 2004 Master Manual.

by the Eighth Circuit targeted by this petition. Although the Dakotas attempted to revisit the issue of the proper construction of the Flood Control Act that had been decided in *Ubbelohde*, neither the district court nor court of appeals saw fit to reconsider *Ubbelohde*. Petition at 15. Instead, both courts reaffirmed the holding in *Ubbelohde*. 421 F.3d at 624 (Pet. App. at 15); 363 F. Supp. 2d at 1153 (Pet. App. at 42-43).

REASONS TO DENY THE WRIT

The Dakotas ask this Court to consider whether the Eighth Circuit in *Ubbelohde* correctly held, consistent with this Court's decision in *ETSI Pipeline Project v. Missouri*, 484 U.S. 495 (1988), that flood control and navigation are the “dominant functions” of the Missouri River reservoirs and that those congressional project purposes are entitled to preferential treatment over recreation, a subordinate and ancillary project purpose, in the management of the Missouri River under the Flood Control Act of 1944. This Court already declined to consider this question when it denied *certiorari* in *Ubbelohde*. Petitioners do not identify anything that would change the analysis or otherwise make this issue more appropriate for review now.

While the Eighth Circuit in this case reaffirmed the validity of *Ubbelohde*, it did so in the context of denying the motions of Nebraska, Missouri, and another party for summary judgment. 421 F.3d at 629 (Pet. App. at 15). None of these parties seek review of that decision. The court did not consider the issue in the context of any claim made by petitioners. (Pet. at 15) Nevertheless, petitioners ask this court to consider the *Ubbelohde* decision, but do not explain why that is necessary in the context of this case. There are two reasons petitioners' request should be denied.

First, even if the Court were to grant this petition and consider the holding in *Ubbelohde*, it would not change the outcome in this case. The petitioners do not argue in their petition that the Corps' balancing of interests in developing the Master Manual was improper, nor do they suggest that overruling *Ubbelohde* would

cause the Corps to revise the Master Manual or its management of the system. Any decision on this petition would be advisory only.

Second, Petitioners do not make a serious attempt to find a conflict between the decision of the Eighth Circuit and any decision by this or any lower court. Rather, the Dakotas treat this as if it were an original jurisdiction action for equitable apportionment of the Missouri River. Petition at 24; *see also* Response of Environmental Defense and National Wildlife Federation in Support of Petition for Writ of Certiorari (“Response”) at 1-2. It is not.

1. Even if the holding in *Ubbelohde* were set aside, it would not change the outcome in this case. The Master Manual would still be a binding rule constraining the Corps’ discretion. The petition does not challenge the Corps’ balancing of interests in adopting the revised Master Manual, but only the court’s holding in *Ubbelohde*. *See* Petition at 13. The Eighth Circuit in this case held that the revised Master Manual was not arbitrary and capricious because “[t]he Corps’ balancing of water-use interests in the 2004 Master Manual is in accordance with the [Flood Control Act].” 421 F.3d at 630 (Pet. App. at 15). There is nothing in the record to suggest - and petitioners do not argue - that the balance struck by the Corps would be any different if *Ubbelohde* were overruled. Indeed, the Eighth Circuit recognized that the impact of *Ubbelohde* on the Master Manual, if any, was prospective and hypothetical - entirely dependent on the occurrence of circumstances that might never come to pass. *See In re Operation of the Missouri River System Litigation*, 421 F.3d 618, 629 n.7 (8th Cir. 2005) (Pet. App. at 16). Therefore, even if this Court were to revisit *Ubbelohde* in response to this petition, the 2004 Master Manual would still govern management of the system.

Even assuming that Congress did not assign relative priorities among conflicting uses in the Flood Control Act, the Dakotas point to nothing that suggests the Eighth Circuit was wrong in leaving the balancing of competing interests to the Corps. In fact, in support of their petition, the Dakotas argue that the Corps and the Master Manual have already adopted petitioners’ interpretation of the Flood Control Act. Petition at 22-23. In other words, petitioners

have as much as admitted that this Court would be providing only an advisory opinion were this petition granted.²

The State of Missouri does not concede, of course, that the Dakotas are right, and all uses of the River must be treated equally. Besides being impractical or impossible, that approach ignores the overall structure of the Flood Control Act. It assigned the Corps to build and operate projects the “dominant functions” of which were flood control and navigation. Projects for which the “dominant functions” would be irrigation or power production would be built and operated by the Department of Interior. On this point, both the Department of the Interior and the Corps were in complete agreement in *ETSI Pipeline*. 484 U.S. at 512, n.6-7. Of course, the system at issue is controlled by the Corps - not Interior. Consequently, the “dominant functions” of the system are flood control and navigation. That is confirmed by the declaration of policy of the Flood Control Act, where Congress explained why it was authorizing the building of these dams:

In connection with the exercise of jurisdiction over the rivers of the Nation through the construction of works of improvement, *for navigation or flood control*, as herein authorized

33 U.S.C. § 701-1 (1944) (emphasis added).

The Dakotas’ real complaint - since they are seeking to protect a recreation industry based on a fish introduced only after the reservoirs were completed - must be that the Corps does not manage the reservoirs to meet what they perceive to be the contemporary needs of the basin. If that is a valid criticism (and the State of Missouri does not suggest that it is), it is a criticism to be taken into account by the Corps as it exercises its discretion to manage the

²For this same reason, the arguments made by Environmental Defense and the National Wildlife Federation at pages 4-10 of their Response in support of this petition must be rejected.

system under the constraints imposed by the 2004 Master Manual, or by Congress.³

The court below properly applied routine administrative law. It would be judicial activism at its worst to use this petition to revisit the holding in a prior case as a means of usurping the proper exercise of the Corps' discretion granted by Congressional act.

2. The Petition does not suggest any conflict between the decision of the Eighth Circuit and any decision of this Court. Indeed, the petition tries to distinguish this case from *ETSI Pipeline*, the case on which the Eighth Circuit predicated its decision on this issue. *See* Petition at 13, 17-19. Therefore, petitioners cannot argue that their petition should be granted because the Eighth Circuit decision conflicts with this Court's precedents.

The petition also makes no attempt to find a conflict among circuit court decisions. Indeed, there is none. No circuit other than the Eighth has addressed the setting of priorities under the Flood Control Act.

In the event that some other circuit eventually takes up the management of the Missouri River and disagrees with the Eighth Circuit, then the Dakotas or another party may seek a writ of certiorari. But until that time, this Court need not take up controversial and complex Missouri River management questions merely because the river crosses state and district lines.

³In fact, the Response of Environmental Defense and National Wildlife Federation makes manifest the desire to have this Court substitute its judgment for that of Congress and the Corps. They ask this Court to declare the Flood Control Act a living document to be interpreted based on "modern economic and environmental conditions" (Response at 3), rather than on the intent of the Congress that passed the legislation, *compare* Response at 10.

CONCLUSION

For all the foregoing reasons, the Court should deny the writ.

Respectfully submitted,

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